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MANAGING **MORTGAGE RISK**

AN LPLC PRACTICE RISK GUIDE

LEGAL PRACTITIONERS' LIABILITY COMMITTEE

lplc.com.au

CONTENTS

1. INTRODUCTION

This guide addresses the risks involved in acting for lenders, borrowers and guarantors.

The three biggest risks in mortgage claims are:

- not adequately advising borrowers or third party guarantors about the transaction but certifying the advice has been given
- not recognising a mortgage fraud situation
- not advising lender clients about the lack of or inadequacy of security.

Mortgage related claims often appear as the second or third most expensive area of claims in any given year.

New and varied solicitor's certificates, especially relating to self-managed superannuation funds, are still being generated. Practitioners must be on their guard to ensure they comply with rule 11 of the Legal Profession Uniform Legal Practice (Solicitors) Rules 2015, which provides that practitioners are only permitted to use the Law Society of NSW or Law Institute of Victoria form of certificates when giving evidence about advice they gave borrowers or guarantors.

Given these developments and the number of mortgage claims, there is no room for complacency in this area. The adage 'prevention is better than cure' is never more true than in this area of the law.

2. ADVISING BORROWERS OR THIRD PARTY GUARANTORS - AMADIO CLAIMS

REFRESHER

Commercial Bank of Australia -v- Amadio and Anor [1983] HCA 14; (1983) 151 CLR 447

In this landmark case impacting on the involvement of practitioners in lending transactions, the High Court held that a mortgage and guarantee provided by Mr and Mrs Amadio to support an overdraft facility to their son's building company should be set aside.

This was in light of the bank's unconscionable conduct in obtaining execution of the mortgage and guarantee when it should have been evident that the couple were under a special disability or disadvantage, namely:

- their age and limited understanding of English
- their reliance on their son in business matters without the benefit of independent advice
- the circumstances in which the documents were signed.

As a result of the Amadio case and others which followed, the need for security providers, including surety mortgagors, guarantors and direct borrowers, to receive independent legal advice in lending transactions has become a regular part of the lending procedure in Victoria.

Lenders now commonly stipulate that security providers must receive independent legal advice from a practitioner before signing the documents and the practitioner must sign a certificate confirming the advice has been given.

A large number of practitioners have been sued by both security providers and lenders regarding the advice given or the lack of it! Such claims are known as 'Amadio claims' and they commonly occur in the following two ways.

1. The practitioner provides a certificate that advice was given and it is later contested.
2. An unrepresented security provider alleges the practitioner either acted for them or owed them a duty and failed to protect their interests.

SOLICITOR'S CERTIFICATE CLAIMS

In this type of claim the practitioner is asked to provide a solicitor's certificate to the effect that the documentation relating to the transaction was explained to the security provider. This advice is then disputed, and it is often alleged that the practitioner did not adequately explain:

- the full extent of the amount secured by the documents or
- that action might be taken against the security provider to recoup the funds, such as forced sale of the security provider's home and financial destitution.

Some firms have a policy that only one person in the office is authorised to provide practitioner's certificates. This controls the types of clients for whom certificates are given and the quality of advice provided.

LPLC's claims experience shows that there are two high risk categories when providing solicitor's certificates; new clients and third party security providers.

New clients

The highest risk category of solicitor's certificate claims are new clients, particularly clients who walk in off the street. It also includes referrals from relatives, a bank, finance broker, agent or other third party. A problem we typically encounter is that the practitioner treats the attendance as a request for mere witnessing of documents, rather than an occasion calling for the provision of professional advice.

CLAIMS EXAMPLE:

The classic scenario

In one claim a finance broker had been assisting a borrower with various loans for about three years. For one of the loans the broker drove the borrower client to the practitioner's office to witness the signing of the loan and mortgage documents which had previously been posted to the practitioner's office. The practitioner witnessed the client's signature on the loan and mortgage documents and provided a solicitor's certificate as required by the lender.

The practitioner was unaware the client suffered a serious mental disorder but given the long-standing relationship between the finance broker and the borrower, it is likely their broker was aware of the borrower's condition.

Years later the client defaulted and ultimately the security property, the client's home, was sold by the mortgagee.

The client alleged the practitioner had a conflict as the practitioner was acting for the finance broker and was negligent because they didn't explain the loan documents to her or advise her to seek financial advice.

The practitioner's usual practice was to advise the client in conference on the general nature and effect of the documents. There were no file notes and no letter was sent to the client confirming the advice given in conference.

This claim highlights the importance of being vigilant when providing a solicitor's certificate, especially when new clients are referred to practitioners on an ongoing basis from one source such as a finance broker.

Some practitioners and firms refuse to provide certificates other than to existing clients because they regard the risk as too high. They regard clients who 'walk in off the street' as a particular risk.

Third party security providers and acting for more than one party

The second high-risk category is guarantors or third-party mortgagors in a transaction where the practitioner or firm is also acting for the borrower. The practitioner often fails to appreciate the security provider's different interest to the borrower and the potential or actual conflict in acting for both parties. While the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 permits practitioners to act for more than one party in some circumstances they are limited and the common law about acting in a conflict is still relevant.

Below are some common conflict scenarios.

Parent and child claims

Practitioners advising third party security providers who are parents providing security for a loan to their child, often to support the child's business is one of the most common situations. A variation on this is the parent actually borrowing the money and providing the security and then on lending the money to their child or the child's business.

CLAIMS EXAMPLE:

Mother's loans to her son

In one claim, a 76-year-old mother signed several loan agreements, mortgages and variation of mortgages over several years in connection with loans to her son. The mother and son were involved in a number of property development projects.

The son defaulted and the lender sought possession of the mother's home. The mother, who was a pensioner, claimed she did not read or write English and did not understand what she was signing. She alleged the practitioner had not explained the documents to her or engaged an interpreter.

The practitioner was adamant that he had explained the documents to her and she understood what she was signing. However, it was difficult to prove what advice was given as there were no file notes for all attendances.

This claim highlights how an Amadio-type claim can arise even where a client is known to the firm and how important it is to:

- keep good files notes for all attendances

- explain in strong terms the obvious practical implications of entering into a transaction, particularly in light of a client's financial position. This is especially important where the client is elderly and/or of limited financial means.

CLAIMS EXAMPLE:

Mother, son and capacity

In another claim involving a mother and son, the son ran a building company which was in financial difficulty. In 2009 the son convinced his mother to mortgage her home and arranged for her to attend the practitioner's office to have the documents signed and witnessed. The son failed to repay the loan and the mortgagee sought possession of the mother's home.

The mother alleged her son was present during the meeting with the practitioner. She also said that she did not understand what she was signing as she suffered from cognitive impairment since 2006 and probably had Alzheimer's disease.

The practitioner said he spent approximately one hour explaining the documents to the mother, that the son was not present and he did not believe she lacked capacity. The matter settled for a nominal contribution but this claim highlights the need to be vigilant about issues of capacity and undue influence, especially where the client is elderly

For another example of this sort of claim see the case of *Provident Capital Ltd v Papa* [2013] NSWCA 36. There is a summary of this case under Improvident transactions on page 16.

Claims by spouse / de facto

Another common scenario involves one domestic partner guaranteeing the debts of the other domestic partner or their business. Most typically this is the wife or female de facto spouse.

CLAIMS EXAMPLE:

Who is the client?

Ms Brown lent money to Mr Smith on two occasions. The security for the loan was property owned by Ms Brown and property being purchased by Mr Smith. It was alleged the practitioner acted unconscionably because he had a conflict and did not inform one party to seek independent legal advice. The practitioner believed he only acted for one person, Mr Smith. Ms Brown alleged the practitioner also acted for her in relation to the loan and payment of funds by her to Mr Smith. It was also alleged the practitioner knew Mr Smith was in financial difficulty.

CONFLICT

In some Amadio claims where practitioners gave advice to third party guarantors, it was later alleged the practitioners either acted for the borrower in the same transaction or had acted for the borrower in other transactions and therefore had a conflict of interest.

The courts subjectively weigh each case on its merits to determine if the advice given by the practitioner was adequate to alert the guarantor to any relevant risks. Conflict will be just one of the issues to be looked at. A practitioner acting in conflict is more likely to be sued for negligence or breach of their fiduciary duties.

Conflict can also occur when acting for co-guarantors where the co-guarantors have different interests. These include husband and wife directors, business partner directors, and husband and wife where one is director but the other is not and doesn't have any knowledge of the business financial situation.

CLAIMS EXAMPLE:

Acting for the business and the company

A practitioner initially acted for an individual (original client) in the purchase of a business. A company was nominated as the purchasing entity. Another party was appointed as the sole director of the corporate purchaser and was also the sole shareholder. The original client believed the shares were held on trust for him and his spouse.

The company obtained finance to fund the bulk of the purchase price for the business. The security for the loan included personal guarantees and mortgages over land owned by the spouses of the sole director and the original client.

The original client and his spouse, along with the sole director and his spouse, attended the practitioner's office to sign the security documents. The practitioner was concerned with the lack of independence in providing the guarantors with a solicitor's certificate but proceeded to do so after approval from the lender.

Years later the corporate borrower defaulted on the loan and the lender called on the guarantees. The guarantors denied the validity of the guarantees and alleged the practitioner was liable for their loss on the basis that the practitioner had a conflict and did not properly advise them about the guarantees. The matter eventually settled with the practitioner paying a considerable sum to the lender.

UNREPRESENTED SECURITY PROVIDERS

In these type of claims the practitioner believed they never acted for the security provider who was unrepresented, but only for the borrower (or in some cases, the lender). This is not the view of the security provider who argued that some kind of retainer existed, or duty was owed and the practitioner failed to protect their interests. In those cases the security provider also alleged the practitioner had a conflict of interest.

Transactions involving security providers always require caution, especially where the parties are unrepresented. Often it is these parties who are inclined to argue that they would not have signed the document had they been properly advised.

We still see cases where a practitioner, sued by a security provider claiming a retainer existed or duty was owed, steadfastly maintains they were only acting on behalf of the borrower. However, the manner in which the practitioner conducted the matter can sometimes be open to contrary interpretation. It is easy for an unrepresented security provider to interpret contact from any practitioner as being the practitioner acting for them.

THE CORRECT FORM OF CERTIFICATE

Certificate about advice to borrower or guarantor

Rule 11 of the Legal Profession Uniform Legal Practice (Solicitors) Rules 2015 (Solicitors Rules) governs how evidence is to be given of advice given to borrowers or guarantors.

Rule 11.2 - verification of identity

Rule 11.2 says you need to verify your client's identity by using the VOI Standard in schedule 8 of Model Participation Rules[1], which requires you to do face to face in person VOI. The reasonable steps option available in the body of the Model Participation Rules for most conveyancing transactions is not referred to in Rule 11 of the Solicitors Rules and not available when providing solicitor's certificates.

LPLC has published a checklist and a number of other documents about undertaking a VOI. You can find these on our website here.

Evidence of advice

Rule 11.3 of the Solicitors Rules says if a practitioner is asked to provide evidence of the advice they gave a borrower or a guarantor it must be in the form of:

- Law Society of NSW Declaration by Borrower/Grantor of a Security Interest Schedule 1, 1A or 1B, or
- Law Institute of Victoria Australian Legal Practitioner's Certificate 1 (Schedule 1).

The most current versions of the LIV form of practitioner's certificates and the acknowledgement and interpreter's certificate can be found on LPLCs website. Electronic versions can be purchased from elawforms.

The two forms of certificates issued by the LIV are designed to cover the following two categories of clients.

1. Australian Legal Practitioner's Certificate 1 – where the client is the direct borrower or is a security provider referred to in the documents as the borrower.
2. Australian Legal Practitioner's Certificate 2 – where the client is a third party guarantor, surety mortgagor or indemnifier for the principal borrower.

Client expectations

Using the LIV or NSW Law Society's form of certification does not solve all the problems associated with Amadio claims. One of the reasons is that lenders tell their customers that their security documents need to be signed in front of a practitioner, rather than they need to seek legal advice before signing the documents. The emphasis is often placed on obtaining the signature rather than obtaining the advice.

This incorrect approach primes clients to expect the process of obtaining a solicitor's certificate is akin to having a passport application witnessed leading to them becoming dissatisfied by the procedures and costs involved.

In response to LPLC's concerns, at the time the solicitor's certificate package was launched the Australian Banking Association (ABA) encouraged a branch-level education program about the legal service value of the certification process. In particular, the program included instructions that bank officers should:

- not advise customers to come back 'in five minutes' with a signed solicitor's certificate

[1] The Model Participation Rules are determined by the Australian Registrars' National Electronic Conveyancing Council as adopted and made by each jurisdiction pursuant to section 23 of the Electronic Conveyancing National Law.

- explain to customers that it is the bank's requirement that a solicitor's certificate be obtained
- explain to customers that legal advice is required, not merely the witnessing of documents
- advise customers that the practitioner will need to consider the documents before providing legal advice and be entitled to charge a reasonable fee for the service.

The ABA has created a *Code of Banking Practice* which covers a wide variety of issues. In particular it prescribes the information banks should give to guarantors before they accept guarantees from them. This includes telling the guarantor they should obtain independent legal advice as well as giving them information about the credit facility that is to be guaranteed and the creditworthiness of the debtor. A copy of the Banking Code of Practice as well as a list of the banks that have agreed to comply with it is available on the ABA website.

NEW AND/OR INAPPROPRIATE FORMS OF CERTIFICATION

Some banks, financial institutions and franchisors have deviated from the solicitor's certificate package both in form and substance. Some forms purport to certify matters other than explanations of mortgages or guarantees.

Certificates with misleading headings

In some cases a certificate headed 'Certificate of witness/identification' not only asked for certification that the signatory was one and the same person as that named in the mortgage but also asked for certification that the signatory had signed the mortgage of their own free will and with full understanding of the documents. This document was, by stealth, a solicitor's certificate. Always read the document before signing it and do not rely only on the heading.

Inappropriate warranties

We have seen certificates where the borrower's practitioner was asked to certify that the loan documentation was enforceable against the borrower. Another form of certificate stated that 'the practitioner will warrant the warranties provided by the guarantor'. Neither of these certificates or warranties are appropriate for a practitioner to give when acting for the borrower or guarantor.

Certificates that are too broad

A certificate titled 'Certificate of independent legal advice' was forwarded to LPLC. It looked similar to the LIV certificate but required the practitioner to certify broadly that the practitioner had 'advised the borrower before any documents listed in the certificate were signed'. There was no further detail about what the advice covered.

The document also contained a statement that 'This certificate cannot be relied upon unless it is in the exact form prescribed by the Law Society of NSW without alteration and … is given by the holder of a current practicing certificate…'. This gave the impression that the document had the imprimatur of the Law Society of NSW which it did not. Eventually the lender in question was persuaded to accept the LIV form of solicitor's certificate instead.

Certificates about financial advice

A certificate referred to us required an independent financial adviser to advise the client about the financial impact and effect of the loan. The loan capitalised the interest. Much of the certificate referred to financial advice and there were also aspects that appeared to require legal advice. When asked whether a practitioner was required to sign the document, the bank indicated that 'many practitioners' had signed such certificates. For this style of loan, the bank did not require a separate solicitor's certificate. While it was clear that clients seeking to enter into these types of transactions required legal advice, it was equally clear that the type of certificate provided by the bank went beyond the realm of legal advice, and was not one practitioners should sign.

Trust opinion certificate

Rule 11 only covers advice given to borrowers, guarantors and mortgagors. It does not cover the trust opinion certificates or letters that practitioners are asked to sign where the borrower is a trust. These opinion letters or certificates are not usually evidence of the advice that was given but rather the borrower's practitioner's opinion about various matters relating to the formation of the trust and its entitlement to borrow the money including that:

- the trust documents given to them contained all the terms of the trust,
- there was no conflict of interest which would preclude the trustee entering into the loan and
- the loan was for the benefit of the trust.

These facts are often outside a practitioner's knowledge and may take a substantial amount of time and money to verify. Practitioners should not sign these documents if they cannot verify the truth of the statements.

See page 26 for a typical opinion certificate used by the major banks and LPLC's comments to assist practitioners when asked to provide such a certificate.

SMSF certificates

Practitioners acting for self-managed superannuation funds (SMSF) borrowing money are usually asked to provide certificates to lenders that go beyond certification of advice given and become opinion letters like the trust opinion letters discussed above.

The certificate usually provides that the practitioner has reviewed certain documents including the loan documents, deed constituting the superannuation fund and bare trust deed. The practitioner is often required to certify that the superannuation fund has been validly constituted and complies with the *Superannuation Industry (Supervision) Act 1993* (Cwlth) (SIS Act). This is not something many practitioners will know and it is more appropriate that these compliance matters be referred to the client's auditor.

A practitioner is also unable to advise on matters beyond their control. For example, a certificate may require the practitioner to certify that on completion the bare trustee will be the registered proprietor of the real estate. The lender will have the control of the transfer of land following settlement and so should not require the practitioner to certify such a matter.

Other matters may be known only to the borrower, and the borrower should provide any necessary certification relating to these matters, such as the requirement to certify that the loan funds will be used to acquire the real estate.

There is some argument that the effect of the wording of this type of certificate is that a practitioner is advising the lender. This may give rise to a conflict with the duties owed to the borrower. Wherever possible the lender should be told this and that the opinion required should more properly be given by the financier's legal advisors.

Franchise certificates

We have seen many and varied solicitor's certificates relating to the purchase of a franchise as there is no standard form. Practitioners should read these certificates carefully and not sign one that states the practitioner advised the franchisee and the guarantor unless they are the same person.

USE OF STATUTORY DECLARATIONS

Rather than seeking a certificate, a lender may request the practitioner witness a statutory declaration given by the security provider attesting to certain matters about the loan transaction.

By witnessing the client's statutory declaration that they have received legal advice the practitioner is effectively giving a solicitors certificate in stealth. Their signature on the statutory declaration is effectively a representation to the lender that the practitioner did give the advice, because it would be inappropriate for a practitioner to witness a statutory declaration they know to be false.

Practitioners who give the client advice about the documents and transaction, and then witness the client's statutory declaration to that effect, need to treat this as if they are giving a solicitor's certificate. Follow the guidance given above and the recommendations below. In particular, the advice that should be given, keeping a file note of what occurred at the meeting and confirming the advice in writing.

OUR RECOMMENDATIONS

Providing a solicitors certificate for the borrower or third party security provider

- ❑ Allocate only one senior person in the office to give solicitors certificates.
- ❑ Confine the provision of a solicitors certificate to existing clients.
- ❑ Where the client receives the security documents before you, request they send you the documents well in advance of your meeting to give you sufficient time to read them.
- ❑ Where you receive the security documents before the client, provide a copy of the documents to the client prior to signing to give them sufficient time to read them.
- ❑ If there is more than one client, consider whether their interests are the same. What assets do each of them have at risk? IF they are different you should only act for one.
- ❑ Never act for both the borrower and a third party security provider.
- ❑ Always advise the security provider client without the borrower present – unless the security provider is the sole director of the borrower company.
- ❑ Comply with rule 11.2 of the Legal Profession Uniform Legal Practice (Solicitors) Rules 2015 and use the Verification of Identity Standard in schedule 8 of the Model Participation Rules - face to face in person VOI.
- ❑ Use an independent interpreter if the client has limited English.
    - Obtain written confirmation from the interpreter.

- Never use the person who is seeking to gain from the provision of the security as interpreter.
- If you speak the client's language you do not need an interpreter but you may be asked to verify your proficiency if the certificate is ever challenged.

- ❑ If the client is the borrower, ask why they are borrowing the funds.
- ❑ If the client is the borrower, ask why they are borrowing the funds and record their response.
- ❑ If the client is the third party security provider ask them why they are providing the security and record their response.
- ❑ Advise the client about the key elements of the documents and the worst case scenario including the obvious practical implications of the transaction. Key elements will include:
    - joint and several obligations
    - interest rates
    - default clauses
    - that the mortgagors or guarantors may lose their property first
    - that the amount repayable can be more than the amount borrowed.
    - any unusual clauses
- ❑ Ask the client to tell you what they understood your explanation to mean and record their response.
- ❑ Address the possibility of capacity, undue influence or duress.
- ❑ Ask your borrower client why they are borrowing the money and record their advice.
- ❑ Do not provide financial advice.
- ❑ Advise your borrower client of the interest rates applicable to the transaction. Advise them in strong terms to obtain independent financial advice about the loan and the investment for which they are borrowing the money. Refer your client to a qualified accountant or financial adviser and ensure they have enough time to obtain this advice
- ❑ Advise your security provider client in strong terms they should obtain independent financial advice about the ability of the borrower to repay the loan. Refer your client to a qualified accountant or financial adviser. Ensure they have enough time to obtain this advice.
- ❑ Make a comprehensive file note of all attendances on your client, whether in your office or elsewhere. See LPLC's template file note.
- ❑ Check your file notes:
    - are dated
    - identify the author
    - record the duration of the attendance
    - record who was present or on the telephone
    - are legible to you and someone else
    - record the substance of the advice given and the client's response/instructions
    - are a note to the file rather than a note to you.

- ❑ As required by rule 11 of the Legal Profession Uniform Legal Practice (Solicitors) Rules 2015 use the LIV form of certificate even if the financier has provided a different form of certificate.
- ❑ Confirm your advice in writing and seek a signed acknowledgment from the client.
- ❑ Charge appropriate fees that reflect the work done.
- ❑ Keep files indefinitely.

Unrepresented surety mortgagors or guarantors

- ❑ Advise any security providers in writing that you are not acting for them and they should seek independent legal advice.
- ❑ Do not prepare answers to requisitions on the security provider's behalf.
- ❑ Never use the borrower as an agent to reach the security provider.
- ❑ Ensure the security provider signs the disbursement order and you bill the borrower direct.
- ❑ Be clear about who you are acting for in your correspondence with the lender.

Signing solicitor's certificates - generally

- ❑ Only use the form of certificate as specified in the Legal Profession Uniform Legal Practice (Solicitors) Rules 2015 when advising a borrower, a grantor of a security interest or a security provider.
- ❑ Never be complacent about the content and form of documents which lenders insist be signed and/or witnessed by you.
- ❑ Scrutinise what you are being asked to sign.
- ❑ Consider whether the certificate and/or declaration proffered is appropriate and reasonable.
- ❑ Ask yourself whether you can personally vouch for the contents of the certificate and/or declaration.
- ❑ Do not sign unless the matters contained in the certificate and/or declaration are within your knowledge and true.

See these recommendations as **Solicitor's certificates for borrowers or surety providers** checklist on our website.

3. IMPROVIDENT TRANSACTIONS

Many recent cases have considered whether practitioners should have advised their clients against proceeding with various loans because the intended investment was unwise or unsafe.

DOMINIC V RIZ

In 2009, the New South Wales Court of Appeal decision of *Dominic v Riz [2009]* NSWCA 216 softened the obligations on practitioners to advise clients about self-evidently absurd or improvident transactions.

The case concerned Mr and Mrs Riz, who intended refinancing their home to invest in a high-risk scheme and expected to receive a return on the investment that was described at first instances as 'absurd'. The trial judge held that although the retainer was to advise and act on the loan and mortgage transaction, the duty of care extended beyond the limits of the retainer where the subsequent transaction was so improvident and risky. The trial judge found the practitioner liable but the Court of Appeal reversed this decision.

The Court of Appeal in *Riz* said the trial judge had gone too far in finding that practitioners explaining loan and mortgage documents are obliged to address the fairness and reasonableness of the underlying transaction. The court noted that the circumstances in which practitioners have a responsibility to act outside the retainer are 'less than clear'. It acknowledged that if a practitioner sees something outside the retainer that could adversely affect the client they may be obliged to inform the client about it.

The Court of Appeal found that the practitioner had given the clients clear advice that they needed to obtain independent legal and accounting advice about the investment. The practitioner knew nothing about the investment other than that the expected return was very high. The clients were found to be aware of the risks involved.

Prior to the appeal being decided, other decisions explored the scope of the duty of care and whether it may extend beyond the scope of the retainer to include advice on the commercial wisdom of entering a transaction[2]. The courts have not been inclined to impose a duty in circumstances where the practitioner did not assume responsibility to the client or there was no reliance by the client.

PROVIDENT CAPITAL LTD V PAPA

Since *Riz* the Court of Appeal in NSW has further commented on the duty of practitioners in *Provident Capital Ltd v Papa* [2013] NSWCA 36. The practitioner was giving Mrs Papa advice relating to borrowing money which she was then giving to her son for his business. The court found the practitioner should have brought to the attention of Mrs Papa in strong terms the obvious practical implications of her entry into the transaction and he failed to do so.

Risk management

It is good risk management in mortgage and loan transactions to specify:

- the scope of your retainer
- that you are not giving financial advice
- that the client should obtain their own financial advice.

COMMERCIAL V FINANCIAL ADVICE

This may not provide complete protection in the event the client enters into a blatantly improvident transaction. The Victorian Supreme Court in [*Spiteri v Roccisano [2009] VSC* 132-22 VR 596] acknowledged that 'in some cases there may be no bright line of distinction between legal and commercial advice where a practitioner is acting for a client in a commercial transaction'. There is often a blurry line between what is financial and what is legal advice.

While it may be tempting not to ask about the client's arrangements, there is a risk that a court may say you should have known, been suspicious or made further enquiries. To avoid that risk, be proactive – you need to know enough about what the client is doing to determine if the matter is clearly improvident, absurd or 'too good to be true'.

Ask your client questions such as:

- why are they entering into this transaction?
- what are they planning to do with the money they are borrowing and what do they hope to gain?

[2] David v David [2009] NSWSC 8, Kowalczuk v Accom Finance [2008] 343, Spiteri v Roccisano [2009] VSC 132; Permanent Custodians v king (2009) NSWCA 600

- if they are investing the money, what sort of investment is it and is it a managed investment scheme?
- if it is not a managed investment scheme, does the client know what safeguards there are, what security is offered and what that security is worth?

If it is clear the client needs to get independent financial advice, forcefully recommend that to the client and give them the opportunity to obtain that advice before proceeding.

If your client elects not to obtain independent financial advice, consider having them sign an acknowledgement that:

- they were advised to do so
- they declined to do so for the following reasons – (set out what the client tells you about their reasons)
- they are acting contrary to your recommendations in that regard.

4. MORTGAGE FRAUD

In claims involving mortgage fraud, sometimes the fraud is committed by a family member on elderly parents or a spouse. While the practitioner is not usually involved in the fraud, their failure to detect tell-tale signs and properly manage the advice and certification for the loans often facilitates the fraud.

Here is a shortlist of many signature features of mortgage fraud claims. If any of these are present, take extra measures to ensure the borrowing is bona fide.

SIGNATURE FEATURES OF MORTGAGE FRAUD

- It's a family affair:
  - adult child defrauds elderly parents, or
  - one spouse against another.
- Lost or missing duplicate certificate of title.
- Urgency.
- Excuses concerning the unseen borrower.
- No photo identification produced by the borrower.
- One or more of the registered proprietors is overseas and only contacted through a family member or third party.
- A third party is actively involved such as:
  - a non-borrower providing instructions, or
  - a broker.
- Certification is being provided to a new client.
- High risk lender and unencumbered title.
- Settlement money is going to a third party.
- Errors and omissions in the details including:

    - spelling mistakes in names or use of anglicised names different to the names on identity documents
    - omissions or incomplete details.
- inconsistencies in forms of signature.

INCOMPLETE CERTIFICATION

Incomplete or negligent certifications by practitioners can have the unfortunate effect of facilitating a fraud. There are good reasons for going through all the steps including verification of identity and these should not be skipped.

CLAIMS EXAMPLE:

Practitioner pressured into signing certificate with no ID sighted

A practitioner was an acquaintance of a young woman who rushed into his office requesting a solicitors certificate for her parents. The settlement was scheduled the next day and she told him that a conveyancing company was acting for them. The practitioner explained the parents would need to attend the office. Later that day, she returned, pleading with the practitioner and explaining that it was a financial emergency for her parents. Her mother was very sick and downstairs in the car. The practitioner attended the parents briefly in the car, verifying the mother's identity by a copy of her driver's licence but the father produced no photo ID. The certificate signed by the practitioner contained no photo identification of the father.

In fact, the man in the car had been posing as the woman's father. When a claim surfaced, it appeared that the mother and daughter had colluded in the fraud.

For another example of fraud see *XPAK Pty Ltd v Scibilia & Ors [2013] VCC 1260*.

MISSING CERTIFICATE OF TITLE

Mortgage fraud is becoming more sophisticated. In one case the perpetrator even took the trouble to forge a practitioner's signature on a certificate. Lenders' practitioners need to be alert to this possibility, particularly where suspicions are already raised. A lender's practitioner may be exposed to liability by relying on a flawed certificate or advising a client to proceed in the absence of a title.

CLAIMS EXAMPLE:

Deceitful daughter

A practitioner was acting for the lender and a conveyancing company was acting for the elderly borrowers who were mortgaging the family home. The lender's practitioner was concerned that the certificate of title was missing but the conveyancing company assured him an application for a replacement was in progress. The lender was keen to proceed and said he would be satisfied with an undertaking about the replacement certificate of title. The lender's practitioner posted the paperwork directly to the borrowers.

In fact, the daughter of the borrowers had engineered the entire transaction without her parents' knowledge. The title was not missing and the daughter pretended that an application for a replacement had been made. She had been providing the conveyancing company with the day-to-day instructions, had intercepted mail from the lender's practitioner addressed to her parents and produced forged solicitor's certificates.

The practitioner for the lender received the solicitor's certificates but did not scrutinise the certificates closely which would have alerted him to the possibility that the certificates were forged.

OUR RECOMMENDATIONS

Acting for lenders

- ❑ Ensure compliance with the identification requirements relating to mortgagors as specified in section 87A of the *Transfer of Land Act 1958 (Vic)*.
- ❑ Confirm with the lender in writing that you are not providing any advice on the financial wisdom of entering the transaction.
- ❑ Instruct the lender to make its own enquiries about the borrower's credit history and capacity to repay.
- ❑ Carefully read the signed solicitor's certificate and check that:
    - the details and names are complete and consistent with other transactional documents
    - photo identification was provided.
- ❑ If you do not know the certifying practitioner, confirm their existence on the Victorian Legal Services Board + Commissioner's website
- ❑ If any features of mortgage fraud appear from Section 4 of this guide, make the extra enquiries necessary to satisfy yourself it is a bona fide borrowing.
- ❑ Where a lost title application is being processed, do not settle until a new title has been issued.
- ❑ If acting for a lender to recover money owing, note the 15 years limitation period from the date when the right to receive the loan money accrued. See s.20 in the Limitation of Actions Act 1958 (Vic).

Acting for borrowers

- ❑ Talk to each borrower directly and separately.
- ❑ Do not take instructions from third parties.
- ❑ Carefully read the mortgage and loan documents.

- ❑ Use the LIV form of certificate - if a solicitors certificate is required.
- ❑ Insist on photo identification and make photocopies for your records.
- ❑ Never provide a solicitors certificate for pre-signed documents.
- ❑ Ensure you have a signed authority from all borrowers where money is payable to third parties.
- ❑ Keep file notes of your oral advice and confirm the advice in writing to the client.

5. NO OR INADEQUATE SECURITY

Claims in this category occur when practitioners are acting for lenders of all sizes – lending institutions, private lenders and smaller and second or third tier financiers. They do, however, occur more frequently when acting for private lenders, particularly on short term or urgent loans.

COMMON MISTAKES

No or inadequate security mistakes occur because a firm:

- fails to register the mortgage where the practitioner:
  - simply forgot to register the mortgage
  - delayed in registering the mortgage allowing a third-party caveat to be lodged after settlement
  - failed to obtain consent of any prior registered mortgagee
  - lost the mortgage or it was stolen
  - failed to detect that the property comprised more than one title and the mortgage was only registered over one of the titles
  - was unwell and didn't manage to register the mortgage and there was no-one there to pick up the mistakes.
- fails to realise that the borrower was a half owner or not the owner of the property they were purporting to mortgage
- fails to advise the lender about obtaining security, often because the practitioner didn't clarify the limits of their retainer and thinks they are just documenting the deal and not advising the client on the deal
- fails to advise the lender about the unusual nature of the security property, such as:
  - unusual terms in a lease
  - planning schemes
  - encumbrances on title
- fails to pick up a problem with the written valuation[3]
- fails to lodge a caveat where a mortgage is unregistered, resulting in a loss of priority

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[3] LIJ articles: Independent valuations essential for lenders

- acts for both sides and doesn't protect one client by checking what they otherwise would if only acting for one party.

CLAIMS EXAMPLES:

Failing to secure loan for parents

A practitioner was retained by parents to document a loan to their son of $200,000 to pay the balance of the purchase price of a house. The son was purchasing the house with his partner and they were registered on title as joint proprietors.

The loan agreement was between the parents and the son and not with the partner, and provided that:

'…….In consideration of the Lender lending the Borrower the said sum of Two hundred thousand dollars [$200,000] the Borrower gives the Lender a Charge over the Property…..'

'……The Lender shall be entitled to register a Caveat over the Property securing its Charge……'

A caveat was lodged by the practitioner. About 12 months later the son passed away. He had no other assets of any real value at the date of his death as his partner by survivorship became the sole registered proprietor of the house.

The parents brought a claim against the practitioner alleging the practitioner failed to protect their interests as no advice was given to them about registering a mortgage, obtaining security from the son's partner, and/or the effect of the joint tenancy in the event of the death of the son.

The claim ultimately settled with a substantial payment to the parents.

Can you find me a lender?

Not long before settlement of a $2.2M property the purchaser asked their practitioner if they knew of anyone who would lend them some money for the purchase. The practitioner referred the purchaser client to longstanding private lender clients (husband and wife).

The lenders and the purchaser agreed that the loan would be $300,000 for three months at 24 per cent interest. The security would be second mortgages over the purchase property and another property owned by the purchaser.

The practitioner agreed to act for the lenders in relation to the loan and his purchaser client for the purchase. The purchaser told the practitioner he did not want to provide a second mortgage over the other property, as he was going to subdivide it.

The practitioner went back to one of the lenders and told him about the mortgage. The practitioner said that they advised the lender client of the risks of just taking a second mortgage over the one property. They said even with a priority agreement with the first mortgagee, it would only limit the capital and not the interest and costs, and there would be a risk.

The loan went ahead and at the end of the three-month term it was extended by another three months with an extra $100,000 on the basis that the interest due was paid. An equitable charge was provided with the right to lodge a caveat. The lenders indicated they didn't need to have the caveat lodged at the time of the loan.

Ultimately the loan was not repaid and the lender brought proceedings to recover the debt. The lender clients alleged that the practitioner had:

- made representations about the borrower that induced them to make the loan

- not provided any explanation of the loan documents
- not told the clients to obtain any independent financial advice, seek details of the borrower's assets or how the borrower would repay the debt
- not taken any steps to follow up the second amount of interest that was supposed to be paid after six months until about three weeks after it was due
- not told the clients about the borrower's financial problems overseas
- lead the clients to believe further mortgage security would be provided for the extra $100,000 loan
- not told the clients that they would not be able to act if recovery proceedings were required.

The practitioner said they did give one of the lender clients (husband) advice about the adequacy of second mortgage security. There was no file note of that advice and no letter confirming it. There was also no advice given to the other lender client (wife).

Less than half the debt was recovered after the property was sold.

Just document the deal – for both!

A practitioner was originally retained by a borrower developer company to document a deal it had done to borrow $3.4M. The lender was a company which was controlled by one person. It was agreed early on in the practitioner's retainer that they would also act for the lender in this transaction – after all everyone was in heated agreement!

The loan agreement was signed in September and a mortgage was registered the following February.

The borrower had financial difficulties and the loan was restructured twice with increases in borrowings and substituting a second mortgage for a first mortgage with repayment of $1.5M. A further deed was entered. The borrower still struggled to meet its obligations and 18 months later the lender lodged caveats over various lots claiming rights under a mortgage, insisting that the loan agreement was no longer in force and requiring repayment of the money.

The borrowers brought proceedings to compel the lender to remove the caveats. The lender joined the practitioner as a third party, alleging the practitioner should have advised against entering into the amended loan agreement as it was against his interest to agree to it. It is also alleged that the lender's director was under a special disability because of:

- his age
- his emotional attachment to each of the directors of the borrower
- his recent divorce
- his emotional vulnerability
- his financial need as a result of divorce
- poor health
- status as an adult migrant who learnt English as an adult
- limited ability to understand complex legal documents
- reliance on his practitioner.

The practitioner had acted for both parties and while they thought they were only retained to 'document the deal' it should have become clear to them when the original deal could not be complied with that they needed to be concerned about conflict and the need for the clients to receive advice about their options.

Lease terms do matter

The firm acted for a commercial financier in documenting a $6.7M loan and a further advance two months later of $700,000. The security looked good. There were first mortgages over three properties in country Victoria and guarantees from the borrower's directors. However, when there was a default on the loan, the directors were bankrupt and the properties were sold for $2.5M less than the outstanding loan amount.

It was alleged the practitioner had certified that the lease of one of the properties was in order, valid and subsisting, when in fact there were several problems with the lease. The rental on renewal would be reduced significantly to $100,000, plus GST plus outgoings or five per cent of turnover. There was also a clause that effectively meant the $100,000 would not increase over three years which was not brought to the financier's attention. It was clear from the extract of valuation the practitioner had been sent that the valuer had not taken this drop in rent into account.

Our panel solicitor felt this fell squarely within the comments made by Brereton J in *Kayteal Pt Ltd v Dignan & Ors* [2011] NSWSC 197 where he said:

A solicitor is bound to report to the client matters discovered, or that ought to have discovered, in the course of investigating title and preparing for completion, that a reasonably competent solicitor would regard as such as might cause the lender to doubt the correctness of the valuation, or some other ingredient of the lending decision. [38]

It also transpired that there was a second lease that had no minimum rent amount after renewal.

The matter settled with contribution from LPLC as well as from several of the other parties including:

- the valuer
- the managing real estate agent of the property with the problem leases
- the borrowers and their directors.

MORTGAGE DRAFTING MISTAKES

If the mortgage is not properly drafted the security it purports to protect will be illusory. In the case of Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd [2013] HCA 10 the registered mortgage was an all monies mortgage that referred to the loan documents rather than set out the indebtedness in the mortgage itself. Because the loan documents were found to be forged and unenforceable the mortgage was found to secure nothing.

MORTGAGEE IDENTIFYING MORTGAGOR

Section 87A of the Transfer of Land Act 1958 (Vic) requires a mortgagee to properly verify the authority and identity of a mortgagor by taking 'reasonable steps' before the execution or variation of a mortgage.

A mortgagee is able to satisfy the onus by either following the standards set by the Registrar or the Model Participation Rules. If a fraud is committed and reasonable steps were not taken to verify identity the lender will lose the benefit of indefeasibility and the mortgage will be void.

In C & F Nominees Mortgage Securities Ltd V Karbotli & Ors [2020] VCC 987 the court found that the lender had not taken reasonable steps to verify the identity of the mortgagor by relying on a solicitors certificate of a solicitor who was advising the mortgagor about the loan and mortgage documents. In this case the mortgage was witnessed by someone other than the solicitor providing the solicitors certificate.

OUR RECOMMENDATIONS

- Don't dabble in this area, you need to have good precedents and systems.
- Only act for one party even if you are asked to 'just document the deal' for both parties. Be clear who your client is and recommend the other party obtain independent legal advice.
- Advise your clients both orally and in writing of the effect of the documents.
- Avoid informality even with longstanding clients.
- Always do a title search for any security property
- Recommend the client obtain a valuation of the security property
- When a valuation is obtained, examine it carefully for:
  - accurate description of the property
  - any assumptions about the state of completion of a project that has not commenced, rather than the value as it is currently
  - consideration of any lease terms and conditions
  - reference to any relevant planning restrictions affecting the property's use or development
  - material differences between the valuation and any recent contract of sale of the property.
- Where the security is a second mortgage,
  - advise your client on the risks of second mortgages
  - advise your client that enquiries need to be made with the first mortgagee about the extent of their security
  - obtain consent from the first mortgagee to the second mortgage and to limit its priority. This is usually done by a deed of priority.
  - ensure the first mortgagee has taken the necessary action to ensure the second mortgage can be registered
  - if the second mortgage is not registered straight away, lodge a caveat.
- Advise your lender client that they must
  - be satisfied the borrower/mortgagor/guarantor understands the nature of the documents they are signing, either by ensuring the lender gives that explanation or that independent legal advice is obtained. This is essential where there are third party security providers.
  - take reasonable steps to identify the mortgagor in accordance with section 87A of the Transfer of Land Act 1958 (Vic) and relying on the mortgagee's solicitor's certificate may not be sufficient[4].
- Treat related party loan transactions like any other loan on commercial terms and ensure they are properly documented.

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[4] C & F Nominees Mortgage Securities Ltd V Karbotli & Ors [2020] VCC 987

- ❑ For short term, urgent loans advise private lender clients in strong terms about the risks and more than once and via more than one media – spoken, written, diagrams – to try and get them to understand the risks. Given them time to absorb it.

See these recommendations as **Acting for lenders** checklist on our website

6. ADVICE ON EQUITY RELEASE PRODUCTS

The three major equity release products commercially available in Australia are reverse mortgages, home reversion schemes and equity release agreements. Although ASIC provides some advice about the risks of these products on their MoneySmart website these products pose a range of complex issues and risks for practitioners.

Some important variables to consider in assessing the effect of an equity release transaction are:

- the loan or equity release amount
- rate of interest which is usually variable and other fees
- value of the property which can fall as well as rise
- the borrower's life expectancy.

Typically, these products involve no repayments and capitalise interest or reduce the homeowner's equity in the property. Equity is often eroded very quickly and they are often more expensive than traditional forms of borrowing. There is an inevitable measure of uncertainty about the size of the ultimate debt.

As with other forms of mortgage, lenders and equity release providers require borrowers/homeowners to obtain independent legal advice about the transaction before proceeding. In turn, practitioners may be asked to certify that the borrower client has received independent advice about the nature and effect of the transaction.

BEFORE YOU ADVISE AND CERTIFY

The client should discuss product alternatives with an independent financial advisor and choose one on the strength of financial advice, including Centrelink and tax issues, before the practitioner provides legal advice. The client should also consider potential suitability of other options such as downsizing, assistance from family members and the Pension Loans Scheme. There are no 'standard' products or conditions, so before dispensing legal advice spend time reading the fine print. The practitioner needs to understand the mechanics of the transaction including when the title changes hands, what security the borrower has and, particularly, the range of default provisions.

Also consider whether the contract contains any potentially unfair terms and complies with the consumer protection requirements contained in the *National Consumer Credit Protection Act 2009* (Cwlth) (NCCP) which includes the National Credit Code. It is also important to consider whether the client has capacity to enter into the transaction.

WHY EQUITY RELEASE?

Understand the context of the proposed borrowing or equity release transaction. Remember that equity release products are often a more expensive form of finance than conventional loans. They should be understood as a choice of last resort.

Explain the nature and effect of the transaction as well as its risks clearly to the client and document that advice. Record why the client wants to use this product and what they understand of the transaction and the risks. Some situations might require the practitioner to take extra precautions, for example where the borrowing is for the benefit of a third party or intended as a gift.

Act very cautiously where the client appears vulnerable to the influence of another party, the documents are being signed under a power of attorney, English is not the client's first language, there is undue haste to complete the transaction, or the loan money is to be disbursed to a third-party account. If you consider the client is acting under duress decline to act.

The retainer

Charge an appropriate fee for the advice. Providing the certification for a borrower is more than simply witnessing a document. The process will take time and judgment. Be clear that the advice being provided is legal and not financial advice.

OUR RECOMMENDATIONS

Taking instructions

- ❑ Did the client obtain financial advice before seeing you? If not, recommend the client seeks financial advice first.
- ❑ Have other alternatives been considered?
- ❑ What is the money for?
- ❑ Is the money really needed upfront (with interest accumulating and possible Centrelink payment implications) rather than accessible on demand?
- ❑ Who is the money intended to benefit?
- ❑ Are family members or heirs aware of the proposed borrowing?
- ❑ Does anyone live at the property who is not on title but whose rights might be adversely affected by the transaction? Would a non-borrower spouse be better protected by being a co-borrower?
- ❑ How long does the client envisage remaining in the family home?
- ❑ Are there any health issues likely to affect the client's plan to remain at home?
- ❑ If the client intends to retire to a nursing home or facility where an aged care accommodation bond is required, will there be sufficient equity left to achieve this?
- ❑ Has the client made a realistic assessment of other future needs and expenses including medical treatment and day-to-day living expenses?
- ❑ Does the client currently receive any Centrelink or Department of Veterans Affairs' entitlements or other government benefits that might be affected by receipt of a lump sum or annuity, or gifting of the loan money to third parties?
- ❑ Is there more than one borrower? If so, see them all.

Explain to the client the effect of the transaction

- ❑ When title passes to the lender.
- ❑ The basic rights and obligations of the client.
- ❑ Whether there is a 'no negative equity' guarantee and recommend that the client finds a product with such a guarantee.
- ❑ If the product creates a life tenancy, the need to protect this by a caveat over the property.
- ❑ Where the client loses legal title to the property, the need to protect the client's interest by a caveat over the property.
- ❑ The general nature and effect of the mortgage securing the loan.
- ❑ The circumstances when repayment would be required.
- ❑ The client's various obligations to ensure a default is not triggered.
- ❑ The upfront costs and interest payable. If the product is a reverse mortgage, give the client the compound interest payable for five, 10 and 15 years.
- ❑ The effect of the loan on the client's aged pension or other government benefits.
- ❑ What protections there are to remain in the home, including any tenancy protection provisions for the benefit of a non-borrower spouse, children or other third parties living in the home and recommend that the client finds a product with such a provision.
- ❑ The consequences if the property is vacated for any length of time.
- ❑ In what circumstances the property can be sold.
- ❑ When the loan is repayable.
- ❑ How the agreement assigns rights and obligations regarding maintenance and insurance including:
    - who is responsible for payment of building insurance, rates and taxes
    - any requirement to maintain upkeep of the property in order to avoid triggering default provisions
    - details of any powers conferred on the lender to order repairs
    - What constitutes a default and the consequences including default provisions that nullify the 'no negative equity' guarantee
    - The effect of any entire agreement and unilateral variation clauses.

Consider issues of duress

- ❑ Is the money for the benefit of a third party or to be transferred to a third party?
- ❑ Is the money for repayment of a loan being made by an adult child?
- ❑ Are there any indications of pressure from other parties or family members?
- ❑ Is the client mentally or physically infirm?
- ❑ Does the client have decision-making capacity?
- ❑ Is the client dependant on family members to look after their financial affairs?

- ❑ Are children involved in the loan application?
- ❑ Are any documents being signed pursuant to a power of attorney?
- ❑ Are there communication difficulties because the client's first language is not English?
- ❑ Is there family division, particularly between the client's adult children?
- ❑ Is the client in an inexplicable rush to complete the transaction?

Generally

- ❑ Make comprehensive file notes of the client's instructions and your advice, including the reasoning process, your client's response and duration of the meeting.
- ❑ Confirm your advice to the client in writing.
- ❑ Use the LIV approved form of certificate.
- ❑ Charge an appropriate fee.
- ❑ Keep your file.

See these recommendations as **Advice on equity release products** checklist on our website

7. TRUST OPINION FORM OF PRACTITIONER CERTIFICATE

LPLC GENERAL COMMENTS

The certificate in section 7.2 below contains clauses which are commonly found in certificates or opinion letters requested by lenders where the borrower is acting in the capacity as trustee of a trust.

LPLC recommends that opinion letters or certificates of this kind should not be signed by the borrower's practitioner. The information required in these documents is information the financial institutions should be satisfying themselves, and not requiring borrower's practitioners to certify.

If practitioners decide to give the certificate or opinion they need to understand that there is considerable work required to satisfy themselves about the issues raised, and there are some matters that just should not and cannot be answered.

LPLC's comments have been inserted in the certificate as a guide to the matters which need to be considered.

Before a practitioner can provide any certificate to a lender they need to:

- obtain sufficient information and instructions from the client including the original trust deed and any variations
- explain the certificate to the client and also explain any concerns relating to the certificate and seek the client's instructions to request that the lender amend its certificate as required by the practitioner.

TRUST OPINION CERTIFICATION EXAMPLE WITH COMMENTS

Part A – Trust Particulars

Name and Address of Trustee(s):
Name of Trust:
Type of Trust:
Names and Addresses of appointor(s) and guardian(s):
Names of Settlors and Settlement Date of the Trust:
Date and description of Trust Deed constituting the Trust (including variations, deeds of retirement and appointment) ("Trust Deed"):
Vesting Date:

Part B – Legal Representative Declaration

To: ("Bank")
I,.. of...
being a duly qualified legal practitioner have acted as legal representative of the Trustee(s), upon whose instructions I have provided this certificate.

LPLC comment
Specify in the certificate what your role is and be specific. For example, you act for the trustee in relation to the refinance of a loan.

I am of the opinion that:
a. under the Trust Deed, the Trustees(s) has/have the following powers.

- To **borrow or raise money or otherwise obtain financial accommodation**.
- To secure, by **mortgage** or **charge** over the assets of the Trust, **the due performance** by the Trustee/s **of any contract**, agreement or obligation.
- To **guarantee, indemnify** or guarantee and indemnify or secure, by **mortgage** or **charge** over the assets of the Trust, the **due performance of any contract**, agreement or obligation of any other person.
- To **carry on any business**.
- To **open any account** with a bank or financial institution with full power to operate on the account.
- To exercise any of its powers under the Trust Deed either **alone or jointly** with another or others.
- To enter into a transaction despite any **personal interest** the Trustee(s) or their officers, (if a company) may have in the transaction.

LPLC comment
You need to make sure the trust deed contains the precise wording as specified above as near enough will not be good enough. This is a matter of checking the terms of the trust deed.
If the wording in the trust deed is not exactly the same as this certificate raise this issue with the lender and determine whether you can amend the certificate to reflect the wording in the deed.
Where the lender will not agree to amend the certificate or the trustee does not have any of the powers specified then a deed of variation will be required. Raise

this issue with the lender as some lenders have their own form of deed of variation of trust deed to ensure the trust has the correct clauses.

b. the Trust is **properly constituted** under the Trust Deed;

LPLC comment

This is a matter within the knowledge of the trustee and/or settlor and/or any practitioner who set up the trust. Where the practitioner giving the certificate did not establish the trust then the certifying practitioner should tell the lender that it should be deleted and the lender should be told to seek a warranty from the trustee in this regard.

c. each of the **Trust Particulars** set out in Part A above are true, correct and up to date in all respects;

LPLC comment

This is a matter of checking the particulars in the trust and comparing to part A. Any discrepancies may need to be dealt with via a deed of variation. It is also important to verify the information with the client.

d. the Trustee(s) is/are entitled, by the terms of the Trust Deed, to be **indemnified** from the Trust **assets** (other than assets representing distributions or other amounts to which the beneficiaries of the Trust have become absolutely entitled in accordance with the Trust Deed) in respect of obligations incurred by the Trustee(s) under any transaction or document entered with the Bank from time to time ("**Transactions**");

LPLC comment

As mentioned above you need to make sure the trust deed contains this precise wording and amend the certificate and/or deed as necessary.

e. the Trust Deed has been **validly executed** by each party to that document;

LPLC comment

This is a matter within the knowledge of the parties who executed the deed. The lender should be told to seek a warranty from the parties who executed the deed.

f. all necessary State **stamp duties** or similar documentary taxes or duties have been paid and impressed on the Trust Deed;

LPLC comment

As duty requirements have changed over time, always check the duty requirements at the time the trust was created in the jurisdiction of the trust. It follows that the client should be told that in order to give this certification you may need to undertake further investigation and a consideration of the laws that applied at the time that the trust deed was established and/or re-settled. It may be that the lender will accept a warranty from the trustee in this regard rather than certification by the practitioner.

g. the Trustee(s) has/have been **properly appointed** in accordance with the Trust Deed and any applicable law;

LPLC comment

This would usually only be within the knowledge of the person who established the trust such as the practitioner who prepared the deed and arranged for signing and stamping. It follows that the lender should be told that the practitioner is unable to give this certification where they did not prepare the deed. The reference to 'any applicable law' is too broad and the lender should either be more specific or delete this wording.

h. the rights and claims of the Bank under or in connection with any Transaction rank in priority to the claims and rights to the Trust assets of the beneficiaries of the Trust;

LPLC comment

This is not a matter which can be certified by the practitioner. Usually this issue is dealt with in a deed of subordination from the beneficiaries.

i. the Trust is **not a managed Investment scheme** requiring registration under the *Corporations Act 2001* (Cwlth); and

LPLC comment

If you the practitioner and/or the client are unsure the client should be referred to an appropriate MIS expert. In some instances, it may be necessary to seek advice from the client's accountant. In any event this is not something the practitioner should be certifying. The bank should be seeking a warranty from the trustee in this regard.

I acknowledge that the Bank relies on my above opinions in entering into Transaction with the Trustee.

LPLC comment

There is some argument that the effect of this wording is that you as the practitioner is advising both the lender and borrower. This may give rise to a conflict. For this reason you the practitioner should insert an appropriate disclaimer such as: "*I am not acting as your agent when providing you with this information*."

LEGAL PRACTITIONERS' LIABILITY COMMITTEE